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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

SILVIA H. GARCIA, *Petitioner*,

v.

MONROE JONES, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Prison Litigation Reform Act of 1995 amended 42 U.S.C. § 1997e to require inmates to exhaust "such administrative remedies as are available" before initiating an action under federal law.

Does the amendment require prisoners to exhaust internal prison grievance processes that do not confer monetary awards before bringing actions solely for damages?

LIST OF PARTIES

Petitioner is Silvia H. Garcia, Chief Deputy Warden of Calipatria State Prison in California. Respondent is Monroe Jones, a prisoner incarcerated at Calipatria.

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IN THE SUPREME COURT OF THE UNITED STATES

No.

SILVIA H. GARCIA, *Petitioner*,

v.

MONROE JONES, *Respondent*.

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals is set forth at Appendix 1a-2a.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on February 2, 2000. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES INVOLVED

This appeal concerns section 803(d) of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-34, 110 Stat. 1321 (1996), which amended 42 U.S.C. § 1997e.

As amended, § 1997e provides in relevant part as follows:

> (a) Applicability of administrative remedies
>
> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (Supp. IV 1998).

Before it was amended, § 1997e provided in relevant part as follows:

> (a) Applicability of administrative remedies
>
> (1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.
>
> (2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in

> substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section or are otherwise fair and effective.

42 U.S.C. § 1997e (1994).

STATEMENT OF THE CASE

Respondent Monroe Jones is a prisoner incarcerated at Calipatria State Prison in California. He brought this suit under 42 U.S.C. § 1983 (1994) by alleging that he was wrongly transferred to Calipatria from another state prison and that he was illegally placed in administrative segregation. In addition to damages, he asked to be single celled, to have "false statements" removed from his prison records, and to be given certain confidential documents. Chief Deputy Warden Garcia filed a motion to dismiss. The district court granted the motion and gave Jones leave to amend his complaint. Appendix 18a-32a.

In his amended complaint, Jones elaborated upon his previous allegations. He asserted that while he was in administrative segregation he was assaulted by his cell mate and correctional officers and was denied medical treatment, food, clothing, yard privileges, and access to the law library. He also claimed that he lost a prison job as a result of his transfer to Calipatria. According to Jones, these actions deprived him of his rights under the Eighth and Fourteenth Amendments.

Chief Deputy Warden Garcia filed a second motion to dismiss. Among other defenses, she argued that amended § 1997e compelled dismissal of the case because Garcia had failed to exhaust the administrative remedies that were available to him in Calipatria's internal grievance system. The district court agreed and granted the motion. Appendix 3a-17a.

Jones appealed. In his reply brief, he renounced his claims to injunctive relief. Based on this renunciation, the court of appeals reversed the district court's dismissal by relying on *Rumbles v. Hill*, 182 F.3d 1064 (1999), *cert. denied*, 120 S. Ct. 787 (2000).[1] Appendix 2a. In *Rumbles*, the Ninth Circuit concluded that § 1997e imposes no requirement on prisoners to exhaust internal grievance procedures that do not confer monetary awards before bringing suits solely for damages. 182 F.3d at 1067. In direct conflict with *Rumbles*, most circuits that have considered the issue have held that § 1997e requires inmates to exhaust existing internal prison grievance systems before bringing federal actions, regardless of the nature of the relief sought.

REASONS FOR GRANTING THE WRIT

This case presents the Court with the timely opportunity to resolve the split among the circuits regarding the applicability of § 1997e's mandatory exhaustion requirement to prisoners' suits for damages. The Ninth Circuit's approach ignores the plain language and legislative history of § 1997e, and it impedes Congress's goals of reducing prisoner litigation, promoting efficient case management, and minimizing judicial intrusion in state prison affairs.

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1. The inmate in *Rumbles*, Macarthur Rumbles, died while the petition for certiorari was pending in that case.

I.

THERE IS A PRONOUNCED CONFLICT AMONG THE CIRCUITS WHETHER § 1997e REQUIRES PRISONERS TO EXHAUST INTERNAL GRIEVANCE PROCEDURES BEFORE BRINGING AN ACTION SOLELY FOR DAMAGES.

This petition should be granted to resolve the conflict among the circuits regarding the applicability of amended § 1997e's exhaustion requirement to prisoner suits that seek damages as the only remedy. The Ninth, Fifth, and Tenth Circuits hold that the statute imposes no bar on a prisoner's unexhausted claim for damages when money is the sole relief sought and it was unobtainable through the prison's grievance process. *Jones v. Garcia*, Appendix 2a (relying on *Rumbles v. Hill*, 182 F.3d at 1067); *Whitley v. Hunt*, 158 F.3d 882, 887 (5th Cir. 1998); *but see Wright v. Hollingsworth*, 201 F.3d 663, 666 (5th Cir. 2000) (questioning the correctness of *Whitley* and urging the parties to seek an en banc review); *Garrett v. Hawk*, 127 F.3d 1263, 1266-67 (10th Cir. 1997).

Four circuits have adopted an opposite rule. The Sixth and Seventh Circuits squarely hold that § 1997e requires inmates to avail themselves of prison grievance procedures, even when these procedures do not provide monetary awards, before they may bring an action exclusively for damages. *Massey v. Helman*, 196 F.3d 727, 732 (7th Cir. 2000) (relying on *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 537-38 (7th Cir. 1999)); *Wyatt v. Leonard*, 193 F.3d 876, 878 (6th Cir. 1999); *see also Freeman v. Francis*, 196 F.3d 641, 643 (6th Cir. 1999). The Third and Eleventh Circuits are in express agreement with this view, although they adopted the position in cases in which the inmate sought both damages and injunctive relief. *Nyhuis v. Reno*, 204 F.3d 65, 71-72 (3d Cir. 2000) ("[W]e are convinced that the most sensible reading of § 1997e(a) is that the futility exception is not applicable in any

case"); *Alexander v. Hawk*, 159 F.3d 1321, 1325-26 (11th Cir. 1998) ("Since exhaustion is now a pre-condition to suit, the courts cannot simply waive those requirements where they determine they are futile or inadequate.").

The circuit conflict is entrenched. Several courts of appeals, including the Ninth Circuit, have commented on the split, its irreconcilability, and the confusion it has engendered. *Rumbles v. Hill*, 182 F.3d at 1068 ("Authorities are split."); *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d at 537 ("[S]everal courts of appeals have gone the other way."); *Whitley v. Hunt*, 158 F.3d at 886 n.2 ("Among those federal district courts that have addressed the issue, there appears to be substantial disagreement."); *Wright v. Hollingsworth*, 201 F.3d at 666 ("*Whitley* conflicts with the interpretation of amended § 1997e(a) given by three other circuits."); *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) ("Several circuits, as well as district courts in this circuit, are split on . . . whether the administrative exhaustion requirement is inapplicable where the relief requested – i.e., strictly monetary damages – is not 'available' through the administrative process.").

Because the conflict is irreconcilable in the circuits, the need for a resolution from the Court is acute. This petition should be granted because it presents a timely and expedient vehicle for the Court to settle the question conclusively.

II.

THE NINTH CIRCUIT'S APPROACH IGNORES THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF § 1997e.

As amended, § 1997e provides that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42

U.S.C. § 1997e(a) (Supp. IV 1998). The text is clear: if administrative procedures exist, inmates must use them before bringing federal lawsuits. There is nothing in the language to support the lower court's view that exhaustion is mandatory only when administrative programs dispense monetary awards or grant relief precisely congruent with the prisoners' desires.

If the text of the statute were not plain enough, its legislative evolution irrefutably establishes that Congress intended exhaustion to be mandatory regardless of the effectiveness of the available administrative process. Former § 1997e contained a discretionary exhaustion standard applicable when the administrative process was "plain, speedy, and effective." 42 U.S.C. § 1997e(a)(1) (1994). In amending the statute, Congress pointedly deleted this requirement and confirmed that it expected exhaustion to be mandatory regardless whether the administrative process effectively dispenses relief to the prisoners' satisfaction. "[W]hen these words left the statute so did any warrant to inquire whether exhaustion would be unavailing." *Perez v. Wisconsin Dep't of Corrections*, 182 F.3d at 536. The Eleventh Circuit elaborated on this observation:

> The removal of the qualifiers "plain, speedy, and effective" from the PLRA's mandatory exhaustion requirement indicates that Congress no longer wanted courts to examine the effectiveness of administrative remedies but rather to focus solely on whether an administrative remedy program is "available" in the prison involved.

Alexander v. Hawk, 159 F.3d at 1326. Interpreting § 1997e, as the court of appeals did in this case, to apply only when prison grievance systems provide all encompassing relief wrongly reintroduces the requirement of an effective administrative

remedy after Congress specifically deleted it. *Nyhuis v. Reno*, 204 F.3d at 72.

The importance of discerning congressional intent when construing statutory exhaustion requirements was emphasized by the Court in a case arising out of former § 1997e. In *McCarthy v. Madigan*, the Court examined the earlier version of the statute and concluded that it imposed no requirement on federal inmates to exhaust internal grievance procedures before seeking *Bivens* relief. 503 U.S. 140, 150-51 (1992). In reaching its conclusion, the Court provided straightforward instruction on how statutory exhaustion requirements are to be interpreted: "Of 'paramount importance' to any exhaustion inquiry is congressional intent." *Id.* at 144 (quoting *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 501 (1982)). "[A]ppropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme." *Id.* "Where Congress specifically mandates, exhaustion is required." *Id.* (citing *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 579 (1989)).

Four years after *McCarthy* was announced, the PLRA was enacted. Unopposed statements made during congressional floor debates reveal that § 1997e was amended in direct response to the Court's holding in *McCarthy* so as to impose on prisoners the obligation to exhaust all available administrative procedures before initiating federal actions, regardless whether they seek judicial relief by only requesting damages:

> The real problem with these cases came with the Court's decision in 1992 that an inmate need not exhaust the administrative remedies available prior to proceeding with a *Bivens* action for money damages only. *McCarthy v. Madigan*, 112 S. Ct.

> 1081 (1992). This decision was made without the benefit of any legislative guidance and the Court made that point very clearly in its opinion, almost to the point of asking that Congress do something. . . . I am very pleased to say that I have worked with the conferees of H.R. 2076 to ensure that the prison litigation reform measures address the *Bivens* issue. The new administrative exhaustion language in H.R. 2076 will require that all cases brought by Federal inmates contesting any aspect of their incarceration be submitted to administrative remedy process before proceeding to court.

141 Cong. Rec. H14078-02, *H14105 (statement of Rep. Lobiondo). Because the PLRA was not passed as a committee bill, but rather was attached as a rider to an appropriations bill, "floor debate is more indicative of legislative intent than it otherwise would be, especially where the floor statements in favor of the bill remain uncontested as was the case with Congressman Lobiondo's remarks." *Garrett v. Hawk*, 127 F.3d at 1266 n.2; *see also Patsy v. Board of Regents of Florida*, 457 U.S. at 502-11 (relying on floor debates in interpreting statutory exhaustion requirement).

The Ninth Circuit has never examined the language or legislative evolution of § 1997e. In this case, it simply relied on its holding in *Rumbles* to support its conclusion that exhaustion is unnecessary. Appendix 2a. The opinion in *Rumbles* similarly contained no legislative analysis. It only declared that the court was bound to reject a mandatory exhaustion requirement for state inmates seeking damages because a similar approach had been adopted for federal prisoners. 182 F.3d at 1068-69 (citing *Lunsford v. Jumao-As*, 155 F.3d 1178 (9th Cir. 1998)). But the persuasive and

precedential value of the one-paragraph decision in *Lunsford* was exaggerated: The case was decided on a stipulation between the parties, and the opinion never mentioned, let alone evaluated, the text or evolution of the statute. 155 F.3d 1178.

The Ninth Circuit's refusal to require exhaustion for prisoner actions seeking exclusively damages "impose[s] an enormous loophole in the PLRA, which Congress clearly did not intend." *Alexander v. Hawk*, 159 F.3d at 1326. The text of amended § 1997e, its rejection of the earlier statute's requirement that the administrative remedy be effective, and other legislative circumstances confirm that by enacting the PLRA Congress intended to require prisoners to exhaust all claims administratively before initiating federal litigation, regardless whether the particular relief desired could be procured in the administrative process. The Ninth Circuit's approach ignores congressional intent, and this petition should be granted to review and correct the lower court's error.

III.

THE QUESTION PRESENTED IS IMPORTANT.

This petition should be granted because the Ninth Circuit's decision undermines the important goals of reducing prisoner litigation, promoting efficient case management, and minimizing judicial intrusion in state prison affairs.

First, by allowing inmates to avoid an administrative review of their complaints, the lower court's approach thwarts Congress's goal of reducing prisoner litigation. Under the Ninth Circuit's construction of amended § 1997e, prisoners must simply assert a claim for damages only -- or seek some other type of relief that cannot be bestowed in the administrative process -- to avoid the exhaustion requirement. This interpretation encourages inmates to file suits for damages and forecloses the possibility of an administrative resolution of

disputes. "When an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted, or at least piecemeal appeals may be avoided." *McCarthy v. Madigan*, 503 U.S. at 145.

An increase in the number of prisoner lawsuits is exactly what Congress did not want when it passed the PLRA. Senators expressed frustration that the number of prisoner lawsuits "has grown astronomically -- from 6,600 in 1975 to more than 39,000 in 1994." 141 Cong. Rec. S14408-01, *S14413 (statement of Sen. Dole for himself and eleven other senators). In response to this burden, the PLRA was enacted to "curtail the ability of prisoners to bring frivolous and malicious lawsuits by forcing prisoners to exhaust all administrative remedies before bringing suit in Federal court." 141 Cong. Rec. H14078-02, *H14106 (statement of Rep. Canady). The lower court's decision should be reviewed because it impedes the achievement of this objective.

The Ninth Circuit's approach also interferes with the efficient judicial administration of prisoner cases. Under it, district courts are forced to parse out inexact allegations to ascertain the exact relief sought. It also requires "judges to act as detectives as they attempt[] to discover whether the local administrative process could have, would have, or might have afforded the inmate relief." *Nyhuis v. Reno*, 204 F.3d at 75. Furthermore, inefficiencies arise when exhaustion is excused because district courts are deprived of the opportunity to review contemporaneous administrative records. "[E]ven where a controversy survives administrative review, exhaustion of the administrative procedure may produce a useful record for subsequent judicial consideration . . . ." *McCarthy v. Madigan*, 503 U.S. at 145.

Finally, by allowing inmates to avoid administrative redress of their complaints, the Ninth Circuit's decision undermines Congress's goal of minimizing judicial intrusion in prison affairs. *See, e.g.*, 142 Cong. Rec. S3703-01, *S3704

(statement of Sen. Abraham) ("Our proposals will return sanity and State control to our prison systems."); 141 Cong. Rec. S14611-01, *S14626 (statement of Sen. Dole) ("These guidelines will work to restrain liberal Federal judges . . . who have used these complaints to micromanage State and local prison systems."); *Id.* at *S14627 (statement of Sen. Hatch) ("[I]t is time to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators . . . ."); 141 Cong. Rec. H1472-06, *H1480 (statement of Rep. Canady) ("The bill also provides much needed relief for States dealing with the problem of frivolous litigation by prisoners and unreasonable Federal court intervention in the operation of jails and correctional facilities.").

Concerns about court intrusion in prison affairs are heightened in cases such as this one that involve state penal facilities. "[A]dditional comity considerations obtain in the § 1983 context -- which are not implicated by a Bivens action -- given the strength of the interest that state prisons[] and state courts[] have in resolving complaints filed by state prisoners." *Booth v. Churner*, Nos. 97-7487, 97-7488, 2000 WL 251627, at *8 (3rd Cir. Mar. 7, 2000). "[F]ederalism and efficiency considerations are [also] implicated . . . because of the greater difficulty federal courts may have in interpreting and/or predicting the contours of state law and state administrative regulations and practices." *Id.*

Requiring exhaustion gives prison officials the first opportunity to address inmate grievances, correct possible wrongdoing, and mitigate damages. Providing prison administrators with the ability to resolve problems early and outside the context of litigation advances important governmental interests in curbing frivolous lawsuits, promoting efficient case management, and minimizing judicial intervention in state prison affairs. The Ninth Circuit's interpretation of § 1997e should be reviewed because it undermines these interests.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: April 27, 2000.

Respectfully submitted,

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APPENDIX

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONROE JONES, **Plaintiff-Appellant,** **v.** **S. H. GARCIA, Deputy Warden; CALIPATRIA STATE PRISON; JOHN DOES 1-10; JANE DOES 1-10,** **Defendants-Appellees.**	**No. 98-55496** **D.C. No. CV-97-62-IEG** **MEMORANDUM**[1]

Appeal from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

Submitted January 18, 2000[2]

Before: BEEZER, O'SCANNLAIN, THOMAS, Circuit Judges.

Monroe Jones, a California state prisoner, appeals pro se the dismissal without prejudice of his 42 U.S.C. § 1983 action against prison officials, seeking damages and injunctive relief

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1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

2. The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

based on alleged violations of his constitutional rights. We reverse the district court's dismissal for failure to exhaust administrative remedies, as required by 42 U.S.C. § 1997e(a), and remand.

First, appellees' motion to dismiss this appeal for lack of jurisdiction is denied. The district court's dismissal without prejudice to refiling after exhaustion of administrative remedies did not grant leave to amend and was a final, appealable order. *See National Distrib. Agency v. Nationwide Mut. Ins. Co.*, 117 F.3d 432, 433-34 (9th Cir. 1997); *WXM Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

Second, in his reply brief jones waives his claims for injunctive relief.[3] Accordingly, we reverse the dismissal of his claims pursuant to 42 U.S.C. § 1997e(a). *See Rumbles v. Hill*, 182 F.3d 1064, 1066 (9th Cir. 1999) (failure to exhaust administrative remedies does not deprive federal court of subject matter jurisdiction when money damages is sole relief sought and when such a remedy is not available through prison's administrative grievance process), *petition for cert. filed*, 68 U.S.L.W. 3234 (U.S. Sept. 27, 1999) (No. 99-537).

REVERSED and **REMANDED** for further proceedings consistent with this disposition.

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3. Appellant's motion for an extension of time to file reply brief is granted. The reply brief received on March 22, 1999, is ordered filed.

IN THE UNITED STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF CALIFORNIA

MONROE JONES, **Plaintiff,** **v.** **S.H. GARCIA, Deputy Warden at Calipatria State Prison,** **Defendants.**	**CASE NO. 97-0062 IEG (CGA)** **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS UNDER 12(b)(6) [Doc. #24]**

BACKGROUND[1]

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1. In his first amended complaint plaintiff fails to specify the factual background which gave rise to the alleged constitutional violations. Instead, plaintiff uses the amended complaint as an opportunity to add additional information to his original complaint, in an effort to correct the defects identified by this Court's July 25, 1997 Order granting defendant's motion to dismiss, without reasserting the information contained within that complaint. As defendant Garcia correctly asserts, an amended pleading completely supersedes any earlier pleading and any claims not raised in within the amended pleading are deemed waived. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987) (holding an amended complaint supersedes any earlier complaint and any claims not raised in the amended complaint are deemed waived). Therefore, plaintiff's failure to reallege the relevant facts to support his claims is fatal to this instant complaint. In the interest of affording a pro se litigant in a civil rights case adequate opportunity to correct these deficiencies, however, the Court will discuss the claims raised in the first amended complaint in light of the original complaint's factual background where necessary. This will allow the Court to both (a) coherently discuss the claims raised by the instant complaint and (b) provide plaintiff with guidance in filing any subsequent amended pleadings in the instant case. See Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir 1988) (holding court must construe pleadings liberally and afford

On September 22, 1997, plaintiff, an inmate at Calipatria State Prison ("CSP"), filed a first amended complaint against defendant under 42 U.S.C § 1983 based on alleged violations of plaintiff's constitutional rights.[2] In his amended complaint, plaintiff alleges that his Eighth Amendment rights were violated based on defendant's conduct in (a) placing plaintiff in administrative segregation; (b) faling to protect plaintiff from an inmate attack in administrative segregation; (c) using excessive force to subdue plaintiff in the aftermath of the altercation; and, (d) denying plaintiff access to adequate medical care. Plaintiff also contends that his Fourteenth Amendment rights (a) to Due Process were violated based on his placement in administrative segregation without a hearing,[3] and (b) his Equal Protection rights were violated based on plaintiff's placement in administrative segregation.

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plaintiff benefit of the doubt when appearing pro se in civil rights case).

2. Although plaintiff/s amended complaint only names S. H. Garcia as a defendant, the Court acknowledges that a document entitled "Amended and Supplemental Pleading(s) Pursuant to F.R.C.P. Rule 15" was attached as part of plaintiff's amended complaint. It appears from that supplemental document that plaintiff would like to name Officers Sudue, Huey, Davis and McKenny as defendants under Rule 15. The Court notes that upon filing a second amended complaint, plaintiff may name these officers as defendants in this action. In order to name these officers as defendants, however, plaintiff must identify specific factual allegations linking to these individuals to specific constitutional claims under § 1983. See Ivey v. Board of Regent of University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982) ("Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss").

3. Plaintiff also attempted to assert a due process claim based on the loss of his prison job. However, this claim was dismissed with prejudice by the Court's July 25, 1997 order. See Rizzo v. Dawson, 778 F.2d 527, 530 (9th Cir. 1985) (holding due process claim only cognizable where recognized constitutional interest at stake); Coakley v. Murphy, 884 Ff.2d 1218, 1222 (9th Cir. 1989) (holding that a prisoner has no constitutional right to a work assignment). Therefore, plaintiff cannot reassert that claim in the amended complaint.

In his original complaint, plaintiff alleged that he was falsely accused of being a member/leader of the Black Gorilla Family (BGF), a prison gang. Plaintiff's alleged gang affiliation has resulted, in the past, in his segregation from the general prison population at Folsom State Prison. Original Complaint p. 1, 11.5 - 9; original Complaint Exhibit A.

For the first three weeks upon his arrival at Calipatria, plaintiff was housed in Ad-Seg. Original Complaint p. 1, 11. 10 - 17. In his amended complaint, plaintiff alleges that while he was housed in administrative segregation, plaintiff was assaulted by his cellmate and several correctional officers. Amend. Complaint, p. 2. Plaintiff claims that with the warden watching and plaintiff in handcuffs, correctional officers pepper sprayed plaintiff and beat him with a baton. Amend. Complaint, p.2. Plaintiff further maintains that during his detention in administrative segregation, he was (a) denied medical treatment for the injuries he sustained during the altercation with his cellmate and the correctional officers; (b) denied access to clothing which is available to inmates who are not in administrative segregation; and, (c) denied access to the law library. Amend. Complaint, p. 3.

Defendant now seeks dismissal of the complaint for failure to state a claim under Fed.R.Civ.P. Rule 12(b)(6).

DISCUSSION

A. Legal Standard for Motion to Dismiss Under 12(b)(6)

When ruling on a motion to dismiss, the court must accept all material allegations of fact in the complaint as true and construe those allegations in the light most favorable to the nonmovant. North Star International v. Arizona Corp. Com'n, 720 F.2d 578, 581 (9th Cir. 1983). Unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief, a complaint cannot be dismissed for failure to state a claim. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The pleadings need not allege facts

constituting the claim for relief or defense, but only must give fair notice of the pleader's claim or defense so that opposing parties can respond, undertake discovery, and prepare for trial. Id.

Rule 12(b)(6) dismissal for failure to state a claim is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" in the complaint. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). The court looks not at whether the plaintiff will "ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

Where a plaintiff appears *in propria persona* in a civil rights case, the court must construe the pleadings liberally and afford plaintiff any benefit of the doubt. Karim-Panabi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir. 1988). In liberally interpreting a pro se civil rights complaint, however, the court may not supply essential elements of a claim that were not initially pleaded. "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss," Ivey v. Board of Regents of University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). Nevertheless, the court must give a pro se litigant leave to amend his complaint unless it is "absolutely clear that the deficiencies of the complaint could not be cured by amendment." Noll v. Carlson, 809 F.2d 1446, 1447 (9th Cir. 1987). Thus, before the court may dismiss a pro se civil rights complaint, it must provide the plaintiff with a statement of the complaint's deficiencies. Karim-Panahi, 893 F.2d at 623-24.

B. Analysis: 42 U.S.C. § 1983

Title 42 U.S.C. § 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. Graham v. Conner, 490 U.S. 386, 393-94 (1989). Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person acting under

color of state law committed the conduct at issue, and (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws of the United States. 42 U.S.C. § 1983; West v. Atkins, 487 U.S. 42, 48 (1988); Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled in part on other grounds*, Daniels v. Williams, 474 U.S. 327, 328 (1986).

There appears to be no dispute that the defendant was acting under color of state law when she allegedly deprived plaintiff of his Eighth and Fourteenth Amendment rights. Thus, the Court now proceeds to the merits of plaintiff's § 1983 claims against the defendant.

1. Plaintiff's Eighth Amendment Claims

a. Placement in Ad-Seg Constitutes Cruel and Unusual Punishment

Plaintiff alleges that his three-week placement in Ad-Seg at Calipatria constitutes cruel and unusual punishment, in violation of the Eighth Amendment. Amend. Complaint, p. 2.

The Eighth Amendment of the United States Constitution prohibits the infliction of "cruel and unusual punishment." Ingraham v. Wright, 430 U.S. 651, 664 (1977). The Supreme Court has held that a prison official violates the Eighth Amendment when two requirements are met. First, the deprivation alleged must be, objectively, "sufficiently serious." Farmer v. Brennan, 511 U.S. 825, 834 (1994). Second, the official must have acted with deliberate indifference to the prisoner's needs. Farmer, 511 U.S. at 834.

The Eighth Amendment is violated with respect to prison conditions and practices when inmates are deprived of the "minimal civilized measure of life's necessities," Hudson v. McMillian, 503 U.S. 1, 9 (1992), "occurring through deliberate indifference by prison personnel or officers." Wilson v. Seiter, 501 U.S. 294, 3022-03 (1991) What the Supreme Court meant

by "minimal civilized measure of life's necessities" received fuller explication in a later opinion:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs- e.g., food, clothing, shelter, medical care and reasonable safety - it transgresses the substantive limits on state action set by the Eighth Amendment.

DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 200 (1989).

In an effort to satisfy this test, plaintiff amends his complaint to include general allegations that during his incarceration in administrative segregation, plaintiff was denied access to (a) the law library and (b) the clothing available to inmates in the general population. Amend. Complaint, p. 3.

The Court finds these allegations do not demonstrate that plaintiff was denied the "minimal civilized measure of life's necessities." In other words, plaintiff's alleged deprivations are not, from an objective standpoint, "sufficiently serious" under Farmer v. Brennan, 511 U.S. 825, 834 (1994). With respect to the allegations concerning clothing, plaintiff does not contend that he was denied clothing altogether. Rather, plaintiff alleges he did not have access to the same clothing available to general population inmates. The allegation, therefore, does not indicate that defendant failed to provide for plaintiff's basic needs. With respect to the law library claim, plaintiff fails to allege how he was harmed by his inability to access the law library during this three week confinement in Ad-Seg. See Lewis v. Casey, 116 S.Ct. 2174, 2180 (1996) (holding that prisoner must demonstrate prejudice to legal claims resulting from inadequate access).

Plaintiff also fails to allege that defendant was either (a) personally involved in the alleged wrongdoing or (b)

"deliberately indifferent" to plaintiff's needs. Although plaintiff concluded that these alleged inadequacies in Ad-Seg amounted to deliberate indifference, plaintiff failed to specify how defendant in particular was "deliberately indifferent." See Ivey v. Board of Regents of University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982) (holding conclusory allegations insufficient to withstand motion to dismiss). As there is no respondeat superior liability under § 1983,[4] the failure to allege personal acts by the defendant which have a direct causal connection to the constitutional violation at issue warrants dismissal. Sanders v. Kennedy, 794 F.2d 478, 483 (9th Cir. 1986). Furthermore, plaintiff also fails to include evidence that he has exhausted his administrative appeals as required under 42 U.S. C. § 1997e.[5]

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4. See Palmer v. Sanderson, 9 F.3d 1433, 1437-38 (9th Cir. 1993); see also 1 Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation §§ 3.22-3.23 (3d ed. 1991).

5. Section 1997e(a) provides, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Therefore, defendatn in the instant case must pursue and exhause his administrative remedies within the California Department of Corrections before this lawsuit may move forward.

In California, the administrative appeal system for inmates is decribed in Title 15 of the California Code of Regulations. 'Any inmate or parolee under the [California Department of Correction's] jurisdiction may appeal any department decision, action, condition or policy perceived by those individuals as adversely affecting their welfare." Cal.Code Regs. Tit. 15, § 3084.1(a). In order to exhaust administrative remedies, a prisoner must first attempt to informally resolve the problem with the "staff [member] involved in the action or decision being appealed." Id. § 3084.5(a). If unsuccessful, the prisoner mut then submit a formal appeal on an inmate appeal form (i.e., a CDC 602 form) to the institution's appeals Coordinator or Appeals Office, id. § 3084.5(b), and if unsuccessful there, must submit a formal appeal for second level review, id § 3084.5(c), which is conducted by the institution head or designee. Id. § 3084.5(e)(1). Finally, the prisoner mut submit a formal appeal for third level review to the director of the California Department of Corrections or the director's designee. Id. § 384.5(e)(2).

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's Eighth Amendment claim based upon conditions of confinement in Ad-Set. Plaintiff's condition of confinement Eighth Amendment claim is **DISMISSED, without prejudice**. Plaintiff may not refile these claims until plaintiff exhausts his administrative remedies under Title 15 of the California Code of Regulations.[6] Furthermore, any future amended complaint must include all of the relevant factual background, legal claims and request for relief in one document. The Court will not read any future amended complaint in conjunction with the earlier complaints in an effort to ferret out either plaintiff's allegations or claims. Plaintiff must also include proof of exhaustion in any future complaint. Plaintiff's failure to address the pleading deficiencies in his Eighth Amendment claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 3373 (9th Cir. 1990).

b. Failure to Protect

In his amended complaint, plaintiff alleges defendant failed to protect him from the inmate attack which occurred while plaintiff was in administrative segregation.

Prison officials may be liable under § 1983 if they fail to protect an attack by one prisoner on another. Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988); Berg v. Kincheloe, 794 F.2d 457, 461 (9th Cir. 1986). To state a claim for failure to protect, a plaintiff must allege: 1) that the specific prison official, in acting or failing to act, was deliberately indifferent to the mandates of the Eighth Amendment; and 2) that this indifference was the actual proximate cause of the deprivation of the inmate's right to be free from cruel and unusual punishment. Leer, 844 F.2d at 634. The Supreme Court has

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6. Plaintiff must also include proof of exhaustion in any future complaint by attaching copies of the relevant administrative appeals submissions and orders.

held that, for purposes of failure to protect claims, prison officials must have been aware of a serious risk of harm to the prisoner. Farmer, 511 U.S. at 834.

Plaintiff has failed to allege specific facts demonstrating that defendant acted with "deliberate indifference" to a "serious" risk of harm or that defendant's deliberate indifference was the actual proximate cause of any Eighth Amendment deprivation. Leer, 844 F.2d at 634. Furthermore, plaintiff has failed to demonstrate the exhaustion of administrative remedies under 42 U.S. C § 1997(c).

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's Eighth Amendment claim for failure to protect. Plaintiff's failure to protect Eighth Amendment claim is **DISMISSED, without prejudice**. Plaintiff may not refile these claims until plaintiff exhausts his administrative remedies under Title 15 of the California Code of Regulations.[7] Plaintiff's failure to address the pleading deficiencies in his Eighth Amendment claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

c. Excessive Force

In his amended complaint, plaintiff contends that officers used excessive force in responding to fight which took place between plaintiff and an unidentified inmate in administrative segregation. In order to state a claim for excessive force, plaintiff must allege facts which demonstrate that officials used force "maliciously and sadistically for the very purpose of causing harm." Hudson v. McMillian, 503 U.S. 1,4 (1992).

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7. Plaintiff must also include proof of exhaustion in any future complaint by attaching copies of the relevant administrative appeals, submissions, and orders.

Ordinarily, plaintiff's allegations that after being handcuffed and, presumably, placed under control, he was brutalized with a baton and pepper spray would be enough to state a claim. In the instant case, however, plaintiff fails to allege that defendant, the deputy warden at CSP, was personally involved in the alleged wrongdoing.[8] This absence is critical because there is no respondeat superior liability in § 1983 actions. Palmer v. Sanderon, 9 F.3d 1433, 1437-38 (9th Cir. 1993); see also 1 Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation §§ 3.22-3.3.23 (3d ed. 1991). Therefore, the failure to allege personal acts by the defendant which have a direct causal connection to the constitutional violation at issue warrants dismissal. Sanders v. Kennedy, 794 F.2d 478, 483 (9th Cir. 1986). Plaintiff also fails to include evidence that he has exhausted his administrative appeals as required under 42 U.S.C. § 1997e.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's Eighth Amendment claim based upon excessive force. Plaintiff's excessive force claim is **DISMISSED, without prejudice.** Plaintiff may not refile these claims until plaintiff exhausts his administrative remedies under Title 15 of the California Code of Regulations. Plaintiff must also include proof of exhaustion in any future complaint. Plaintiff's failure to address the pleading deficiencies in his Eighth Amendment claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

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8. The Court has additional concerns about the general nature of these allegations. Plaintiff fails to specify (a) the date or time of the alleged incident; (b) the other inmate involved in the fight; or, (c) the names of the officers involved in the post-fight brutality. However, the Court need not address these issues as plaintiff's failure to allege defendant's personal involvement is dispositive to the instant claim.

d. Access to Adequate Medical Care

Plaintiff also alleges that his Eighth Amendment rights were violated based on defendant's refusal to accord plaintiff adequate medical care following the incident in Ad-Seg. The Eighth Amendment proscribes deliberate indifference to the serious medical needs of prisoners. Estelle v. Gamble, 429 U.S. 97, 104 (1976). In the instant case, however, defendant fails to allege what medical needs he had in the aftermath of the altercation. Therefore, it is impossible to know whether these general medical needs are sufficiently serious. Plaintiff also fails to personally link defendant to the allegations that plaintiff was denied medical care. See Sanders v. Kennedy, 794 F.2d 478, 483 (9th Cir. 1986) (plaintiff must allege personal acts by defendant which have causal connection to constitutional violation). Furthermore, plaintiff fails to demonstrate that he has exhausted his administrative remedies in pursuit of medical care.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's Eighth Amendment claim based upon access to medical care. Plaintiff's medical access Eighth Amendment claim is **DISMISSED, without prejudice**. Plaintiff may not refile these claims until plaintiff exhausts his administrative remedies under Title 15 of the California Code of Regulations. Plaintiff must also include proof of exhaustion in any future complaint. Plaintiff must also include copies of the pertinent medical records and/or a declaration describing the efforts plaintiff made to obtain those records if he chooses to present this claim after exhausting his administrative remedies. Plaintiff's failure to address the pleading deficiencies in his Eighth Amendment claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990). with the

2. Plaintiff's Due Process Claim

Plaintiff contends that his placement in administrative segregation without a hearing was a denial of due process under the Fourteenth Amendment. There is, however, no federally protected right to remain in the general prison population or not to be placed in Ad-Seg. Sandin v. Conner, 115 S.Ct. 2293, 2300 (1995); Hewitt v. Helms, 459 U.S. 460, 468 (1983). The placement of a prisoner in segregation requires due process protections only if two conditions are met: (1) state law creates mandatory rules for deciding when the prisoner shall be placed in or released from segregation; and (2) the segregation is an "atypical and significant hardship" compared to the normal conditions of confinement. Sandin, 115 S.Ct. At 2301 (no "atypical and significant hardship" where plaintiff was placed in disciplinary segregation for 30 days); Mujahid v. Meyer, 59 F.3d 931, 932 (9th Cir. 1995) (applying Sandin and finding that due process protections are not required when officials place a prisoner in segregation in a Hawaii state prison for fourteen days).

Here, plaintiff has alleged no specific conduct on the part of the defendant forming the basis of his due process claim. Plaintiff also fails to allege that his three-week placement in Ad-Seg posed an "atypical and significant hardship" compared to the normal conditions of confinement. Nothing in the complaint suggests that his three-week Ad-Seg term, for example, imposed more restricted conditions that the "lockdown" regularly imposed on inmates outside of disciplinary segregation, affected the duration of this sentence, or otherwise worked a major disruption of his environment. Although plaintiff alleges that he was beaten by correctional officers during his period of confinement in administrative segregation, plaintiff does not allege that such conduct was part of the treatment inflicted on all of the prisoners in Ad-Seg. This excessive force claim is a stand-alone issue which does not relate to the general conditions of Ad-Seg. The only conditions which plaintiff associates with confinement in Ad-Seg relate to access to the law library and the clothing available

to Ad-Seg inmates. The Court finds that these allegations fail to demonstrate the kind of "atypical and significant hardship" compared to the normal conditions of confinement which is required under Sandin. See Beverati v. Smith, 120 F.3d 500 (5th Cir. 1997) (holding exposure to Ad-Seg for six month term where Ad-Seg cells infested with vermin and inmates receive less clothing that statutorily accorded does not impose atypical hardship sufficient to implicate Sandin liberty interest).

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's due process claim based upon his placement in Ad-Seg. Plaintiff's due process claim based upon his placement in Ad-Seg is **DISMISSED, without prejudice**. Plaintiff may not refile these claims until plaintiff exhausts his administrative remedies under Title 15 of the California Code of Regulations. Plaintiff must also include proof of exhaustion in any future complaint. Plaintiff's failure to address the pleading deficiencies in his due process claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

3. Plaintiff's Equal Protection Claim

Plaintiff alleges that he was denied equal protection on the basis is his three-week placement in Ad-Seg and the allegations that he is a gang member. Orig. Complaint p. 4, l. 15 - p. 5, l. 3.

The "Equal Protection Clause of the Fourteenth Amendment commands that no State shall `deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburn, Tex. V. Cleburne Living Center, 473 U.S. 432, 439 (1985); Shaw v. Reno, 509 U.S. 630 (1993).

Proof of racially discriminatory intent or purpose is required to uphold a racial discrimination claim. Washington v. Davis, 426 U.S. 229, 239-40 (1976). Discriminatory intent

may be proved by direct or circumstantial evidence. Lowe v. City of Monrovia, 775 F.2d 998, 1011 (9th Cir. 1985), *amended on other grounds*, 784 F.2d 1407 (9th Cir. 1986).

Plaintiff fails to allege that he is a member of a protected class. Plaintiff also fails to allege any facts demonstrating that defendant: 1) placed him in Ad-Seg with a discriminatory intent or purpose; 2) brought any false charges against plaintiff with discriminatory intent.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's equal protection claim. Plaintiff's equal protection claim is **DISMISSED, without prejudice**. Plaintiff may not refile these claims until plaintiff exhausts his administrative remedies under Title 15 of the California Code of Regulations. Plaintiff must also include proof of exhaustion in any future complaint. Plaintiff's failure to address the pleading deficiencies in this claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

CONCLUSION

Based on the aforementioned discussion, the Court **GRANTS** defendant's motion to dismiss under Fed.R.Civ.P. Rule 12(b)(6). **IT IS ORDERED** that:

1. Plaintiff's Eighth Amendment claims based on (a) placement in administrative segregation; (b) failure to protect; (c) excessive force; and, (d) inadequate access to medical care are **DISMISSED, without prejudice**. Plaintiff may not refile until he exhausts his administrative remedies. Furthermore, plaintiff must correct the deficiencies identified in section B(1) of this Order prior to refiling. Failure to address these deficiencies will result in future dismissal of the claim with prejudice.

2. Plaintiff's Due Process claim based on his placement in Ad-Seg without a hearing is **DISMISSED, without prejudice**. Plaintiff may not refile until he exhausts his administrative remedies. Furthermore, plaintiff mut correct the deficiencies identified in section B(2) of this Order prior to refiling. Failure to address these deficiencies will result in future dismissal of the claim with prejudice.

3. Plaintiff's Equal Protection claim based on his placement in Ad-Seg based on his gang affiliation is **DISMISSED, without prejudice**. Plaintiff may not refile until he exhausts his administrative remedies. Furthermore, plaintiff must correct the deficiencies identified in section B(2) of this Order prior to refiling. Failure to address these deficiencies will result in future dismissal of the claim with prejudice.

IT IS SO ORDERED.

DATED: Jan. 6, 1998 /s/Irma E. Gonzalez
IRMA E. GONZALEZ, Judge
United States District Court

cc: All Parties
IN THE UNITED STATES DISTRICT COURT FOR

THE SOUTHERN DISTRICT OF CALIFORNIA

MONROE JONES, **Plaintiff,** **v.** **S.H. GARCIA,** **Defendants.**	**CASE NO. 97-0062 IEG (CGA)** **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS UNDER 12(b)(6) [Doc. #4]**

On January 14, 1997, plaintiff Monroe Jones, a state prisoner proceeding pro se and *in forma pauperis*, filed a complaint under 42 U.S.C. § 1983 alleging: 1) cruel and unusual punishment, in violation of the Eighth Amendment, on the basis of: a) placement into administrative segregation (Ad-Seg) at Calipatria State Prison; and b) placement in a cell with an active gang member; 2) denial of due process, in violation of the Fourteenth Amendment, on the basis of: a) placement in Ad-Seg based upon false charges of gang membership; and b) loss of his prison job due to his transfer from one Calipatria facility to another; and 3) denial of equal protection, in violation of the Fourteenth Amendment. Plaintiff also brings claims under 42 U.S.C. §§ 1985 and 1986 for conspiracy as well as state law claims for malicious prosecution, defamation of character, libel, and fraud. Plaintiff names Calipatria Chief Deputy Warden S.H. Garcia as the defendant. Plaintiff seeks compensatory and punitive damages as well as injunctive relief.

Specifically, plaintiff alleges that he has been falsely accused of being a member/leader of the Black Gorilla Family (BGF), a prison gang. Plaintiff's alleged gang affiliation has resulted, in the past, in his segregation from the general prison population at Folsom State Prison. (Complaint, p. 1, II. 5-9; Complaint Exhibit A).

For the first three weeks upon his arrival at Calipatria, plaintiff was housed in Ad-Seg. (Complaint p. 1, II. 10-17). Plaintiff was then released into the general population and housed in "D" Facility. After nine months, plaintiff was transferred to "A" Facility and was removed from his job as a result. (Complaint p. 1, II. 18-23.) At "A" Facility, plaintiff was placed into a cell with "an active crip," an inmate gang member. Plaintiff filed inmate grievances requesting to be housed alone, but his requests were denied. (Complaint p. 1, I. 24 - p. 2, I. 4; Complaint Exhibit A.)

Defendant now moves to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) on the grounds that plaintiff has failed to exhaust administrative remedies under the Prison Litigation Reform Act and under Rule 12(b)(6) for failure to state a claim. After reviewing the memoranda and declarations filed, the Court finds the matter suitable for decision without oral argument. Local Rule 7.1(d)(1).

DISCUSSION

A. Defendant's Motion to Dismiss For Lack of Subject Matter Jurisdiction

1. Legal Standard

Under Rule 12(b)(1), the party invoking the federal jurisdiction, that is, the plaintiff, has the burden of showing that jurisdiction is proper. Thornhill Publishing Co. v. General Tel. & Electronics Corp., 594 F.2d 730 (9th Cir. 1979) (see also Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989)). Unlike motions governed by Rule 12(b)(6), no presumptive truthfulness attaches to plaintiff's allegations when a court considers the merits of jurisdiction. Mortensen v. First Federal Sav. and Loan Ass'n, 549 F.2d 884 (3rd Cir. 1977).

2. Analysis

On April 26, 1996, the Prison Litigation Reform Act of 1996 (PLRA), Pub.L. No. 104-134, 110 Stat. 1321-71 (codified as amended at 42 U.S.C. § 1997e), made the exhaustion provisions of § 1997e(a) mandatory, rather than discretionary. Specifically, PLRA § 803(d) provides that an inmate must exhaust available administrative remedies before bringing suit in federal court:

> No action shall be brought with respect to prison conditions under...42 U.S.C. § 1983, or any other Federal Law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). When exhaustion of administrative remedies is required by a federal statute, the failure to exhaust is a jurisdictional defect and prevents a district court from hearing the claim. Bell v. Calderon, 1996 WL 168564 (N.D. Cal., 1996); Jerves v. United States, 966 F.2d 517, 519 (9th Cir. 1992) (exhaustion requirement of Federal Tort Claims Act is jurisdictional and may not be waived).

Defendant argues that plaintiff has failed to allege that he has exhausted all levels of prison appeals available to him and that, thus, the Court lacks subject matter jurisdiction over the claims. The Court notes that the PLRA is silent as to when the exhaustion requirement is satisfied – for example, is it sufficient for a plaintiff to have presented his or her claims within the inmate grievance system? Does exhaustion require a decision on plaintiff's claims at the California Department of Corrections (CDC) Director's level? Is exhaustion required for damages claims even though an inmate cannot obtain damages within the inmate grievance system? Furthermore, plaintiff provides evidence that he has presented the facts of his claims to the inmate grievance procedure. Plaintiff alleges that he has filed "two 602 State Appeals, and several Letters of complaints

to the Deputy Warden and the Program sergeant." (Complaint para. II(B), (C).) Plaintiff attaches to the complaint a CDC Memorandum dated December 16, 1996, which indicates that: 1) plaintiff has exhausted CDC administrative remedies with respect to his claims based upon placement in a cell with a gang member; and 2) plaintiff has at least informally presented to the prison his claims based upon false charges of gang membeship and transfer between Calipatria facilities. (Complaint Exhibit A.)

Thus, at this stage in the proceedings, the Court finds that plaintiff's allegations are sufficient to confer subject matter jurisdiction. Defendant's motion to dismiss the complaint under Rule 12(b)(1) is **DENIED**.[1] The Court now proceeds to defendant's motion to dismiss the claims under Rule 12(b)(6).

B. Defendant's Motion to Dismiss Under Rule 12(b)(6)

1. Legal Standard

When ruling on a motion to dismiss, the court must accept all material allegations of fact in the complaint as true and construe those allegations in the light most favorable to the nonmovant. North Star International v. Arizona Corp. Com'n, 720 F.2d 578, 581 (9th Cir. 1983). Unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief, a complaint cannot be dismissed for failure to state a claim. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The pleadings need not allege facts constituting the claim for relief or defense, but only must give fair notice of the pleader's claim or defense so that opposing parties can respond, undertake discovery, and prepare for trial. Id.

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1. The Court notes that defendant asks this Court to declare plaintiff a "vexatious litigant." This request is **DENIED** as only the Chief Judge of this District has the power to impose vexatious litigant status. Furthermore, the grounds for sua sponte dismissal under 28 U.S.C. § 1915(g) are more properly addressed at the *in forma pauperis* stage.

Rule 12(b)(6) dismissal for failure to state a claim is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" in the complaint. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). The court looks not at whether the plaintiff will "ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

Where a plaintiff appears *in propia persona* in a civil rights case, the court must construe the pleadings liberally and afford plaintiff any beenfit of the doubt. Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir. 1988). In liberally interpreting a pro se civil rights complaint, however, the court may not supply essential elements of a claim that were not initially pleaded. "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." Ivey v. Board of Regents of University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). Nevertheless, the court must give a prose litigant leave to amend his complaint unless it is "absolutely clear that the deficiencies of the complaint could not be cured by amendment." Noll v. Carlson, 809 F.2d 1446, 1447 (9th Cir. 1987). Thus, before the court may dismiss a pro se civil rights complaint, it must provide the plaintiff with a statement of the complaint's deficiencies. Karim-Panahi, 893 F.2d at 623-24.

2. Analysis: 42 U.S.C. § 1983

Title 42 U.S.C. § 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. Graham v. Connor, 490 U.S. 386, 393-94 (1989). Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person acting under color of state law committed the conduct at issue, and (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws of the United States. 42 U.S.C. § 1983; West v. Atkins, 487 U.S. 42, 48 (1988); Parratt v. Taylor, 451 U.S. 527, 535 (1981), overruled

in part on other grounds, Daniels v. Williams, 474 U.S. 327, 328 (1986).

a. Plaintiff's Eighth Amendment Claims

(1) Placement in Ad-Seg Constitutes Cruel and Unusual Punishment

Plaintiff alleges that his three-week placement in Ad-Seg at Calipatria constitutes cruel and unusual punishment, in violation of the Eighth Amendment. (Complaint p. 5, II. 3-6.)

The Eighth Amendment of the United States Constitution prohibits the infliction of "cruel and unusual punishment." Ingraham v. Wright, 430 U.S. 651, 664-68 (1977). The Supreme Court has held that a prison official violates the Eighth Amendment when two requirements are met. First, the deprivation alleged must be, objectively, "sufficiently serious." Farmer v. Brennan, 511 U.S. 825, 834 (1994). The second requirement follows from the principle that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." Farmer, 511 U.S. at 834.

The Eighth Amendment is violated with respect to prison conditions and practices when inmates are deprived of the "minimal civilized measure of life's necessities," Hudson v. McMillian, 503 U.S. 1, 9 (1992), "occurring through deliberate indifference by prison personnel or officers," Wilson v. Seiter, 501 U.S. 294, 302-03 (1991). What the Supreme Court meant by "minimal civilized measure of life's necesities" received fuller explication in a later opinion:

> [W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment.

DeShaney v. Winnebago County Dept. Of Social Servs., 489 U.S. 189, 200 (1989).

Plaintiff fails to meet this test. Plaintiff has alleged no facts about the conditions of his three-week confinement in Ad-Seg. Plaintiff fails to allege how placement in Ad-Seg deprived him of the "minimal civilized measure of life's necessities" or that the defendant acted with "deliberate indifference." Hudson, 503 U.S. at 9; Wilson, 501 U.S. at 302-03.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's Eighth Amendment claim based upon conditions of confinement in Ad-Seg. Plaintiff's conditions of confinement Eighth Amendment claim is **DISMISSED, without prejudice**. Plaintiff's failure to address the pleading deficiencies in his Eighth Amendment claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

(2) Failure to Protect

Plaintiff alleges that he was "placed into a cell with an active crip" and that his requests to be moved out of the cell were denied. (Complaint p. 1, I.24 - p. 2, I.4.) Plaintiff also alleges that defendant acted with "deliberate indifference" and "reckless disregard for his life, safety..." (Complaint p. 5, II. 25 - 28).

Prison officials may be liable under § 1983 if they fail to protect an attack by one prisoner on another. Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988); Berg v. Kincheloe, 794 F.2d 457, 461 (9th Cir. 1986). To state a claim for failure to protect, a plaintiff must allege: 1) that the specific prison official, in acting or failing to act, was deliberately indifferent to the mandates of the Eighth Amendment; and 2) that this indifference was the actual proximate cause of the deprivation of the inmate's right to be free from cruel and unusual punishment. Leer, 844 F.2d at 634. The Supreme Court has

held that, for purposes of failure to protect claims, prison officials must have been aware of a serious risk of harm to the prisoner. Farmer, 511 U.S. at 834.

Here, plaintiff attaches a December 16, 1996 Memorandum from defendant addressing plaintiff's safety concerns and request for a single cell. (Exhibit A.) This suffices to show that defendant was aware that plaintiff believed he was at risk. However, plaintiff has failed to allege specific facts demonstrating that defendant acted with "deliberate indifference" to a "serious" risk of harm or that defendant's deliberate indifference was the actual proximate cause of any Eighth Amendment deprivation. Leer, 844 F.2d at 634. Finally, plaintiff fails to allege that he has suffered any injury as a result of sharing a cell with an alleged gang member.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's Eighth Amendment claim for failure to protect. Plaintiff's failure to protect Eighth Amendment claim is **DISMISSED, without prejudice.** Plaintiff's failure to address the pleading deficiencies in his Eighth Amendment claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

b. Plaintiff's Fourteenth Amendment Claims

(1) Denial of Due Process

(a) Placement in Ad-Seg Based Upon False Charges of Gang Membership

Plaintiff alleges that defendant is "making false charges against me...not supported by the records" that he is a gang member. (Complaint para IV.) Plaintiff further alleges that his three-week placement in Ad-Seg was because of the false charges. (Complaint p. 4, II 17 - 21.)

The "filing of unfounded charges [does] not give rise to a per se constitutional violation actionable under section 1983" so long as prison officials provide the inmate with a subsequent hearing meeting minimum due process requirements. Freedman v. Rideout, 808 F.2d 949, 951 (2d Cir. 1986), reh'g denied 826 F.2d 194 (2d Cir. 1987), cert denied 485 U.S. 982 (1988). Since Sandin v. Conner, 115 S.Ct. 2293 (1995), federal courts begin the procedural due process analysis not with the "notice and opportunity" requirements outlined in Wolff v. McDonnell, 418 U.S. 539 (1974), but rather by first determining whether a protected liberty interest is at stake.

There is no federally protected right to remain in the general prison population or not to be placed in Ad-Seg. Sandin, 115 S.Ct. at 2300; Hewitt v. Helms, 459 U.S. 460, 468 (1983). The placement of a prisoner in segregation requires due process protections only if two conditions are met: (1) state law creates mandatory rules for deciding when the prisoner shall be placed in or released from segregation; and (2) the segregation is an "atypical and significant hardship" compared to the normal conditions of confinement. Sandin, 115 S.Ct. at 2301 (no "atypical and significant hardship" where plaintiff was placed in disciplinary segregation for 30 days); Mujahid v. Meyer, 59 F.3d 931, 932 (9th Cir. 1995) (applying Sandin and finding that due process protections are not required when officials place a prisoner in segregation in a Hawaii state prison for fourteen days). Here, plaintiff has alleged no specific conduct on the part of the defendant forming the basis of his due process claim, with the exception of a December 16, 1996 Memorandum from the defendant to the plaintiff which simply restates the contents of plaintiff's inmate file concerning plaintiff's past gang activities, in response to plaintiff's request for a single cell. Plaintiff also fails to allege that his three-week placement in Ad-Seg possed an "atypical and significant hardship" compared to the normal conditions of confinement. Nothing in the complaint suggests that his three-week Ad-Seg term, for example, imposed more restricted conditions that the "lockdown" regularly imposed on inmates outside of

disciplinary segregation, affected the duration of his sentence, or otherwise worked a major disruption in his environment.

In sum, plaintiff has not alleged: 1) that defendant took any action with respect to his three-week placement in Ad-Seg; or 2) any facts relating to the conditions of his Ad-Seg confinement and comparing them to the conditions in the general population. Therefore, because plaintiff's three-week placement in segregated confinement does not, as pleaded, present the type of atypical, significant deprivation contemplated in Sandin, no process is due plaintiff.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's due process claim based upon his placement in Ad-Seg. Plaintiff's due process claim based upon his placement in Ad-Seg is **DISMISSED, without prejudice**. Plaintiff's failure to address the pleading deficiencies in his due process claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

(b) Facility Transfer and Loss of Prison Job

Plaintiff alleges that, nine months after he arrived at Calipatria, he was transferred from "D" Facility to "A" Facility and that he lost his job as a consequence.

"A due process claim is cognizable only if there is a recognized liberty or property interest at stake." Rizzo v. Dawson, 778 F.2d 527, 530 (9th Cir. 1985). A prisoner has no constitutional right to a work assignment. Coakley v. Murphy, 884 F.2d 1218, 1222 (9th Cir. 1989); Toussaint v. McCarthy, 801 F.2d 1080, 1106-08 (9th Cir. 1986), cert denied 481 U.S. 1069 (1987) ([t]he administration of state-created work programs is the povince of prison officials, not the district court'). Consequently, the termination of plaintiff's job due to his transfer to "A" Facility does not constitute a violation of due process.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's due process claim based upon his work assignment termination. This claim is **DISMISSED, with prejudice.**

(2) Denial of Equal Protection

Plaintiff alleges that he was denied equal protection on the basis of his three-week placement in Ad-Seg and the allegations that he is a gang member. (Complaint p. 4, I. 15 - p. 5, I. 3.)

The "Equal Protection Clause of the Fourteenth Amendment commands that no State shall `deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985); Shaw v. Reno, 509 U.S. 630 (1993).

Proof of racially discriminatory intent or purpose is required to uphold a racial discrimination claim. Washington v. Davis, 426 U.S. 229, 239-40 (1976). Discriminatory intent may be proved by direct or circumstantial evidence. Lowe v. City of Monrovia, 775 F.2d 998, 1011 (9th Cir. 1985), *amended on other grounds*, 784 F.2d 1407 (9th Cir. 1986).

Plaintiff fails to allege that he is a member of a protected class. Plaintiff also fails to allege any facts demonstrating that defendant: 1) placed him in Ad-Seg with a discriminatory intent or purpose; 2) brought any false charges against plaintiff with discriminatory intent.

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's equal protection claim. Plaintiff's equal protection claim is **DISMISSED, without prejudice**. Plaintiff's failure to address the pleading deficiencies in this claim will result in future dismissal of the claim with prejudice.

Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

3. Analysis: Plaintiff's §§ 1985 and 1986 Claims

a. 42 U.S.C. § 1985

42 U.S.C. § 1985 proscribes conspiracies to interfere with civil rights. Plaintiff alleges a violation of § 1985(3), which concerns conspiracies to deprive an individual of "the equal protection of the laws" or "equal privileges and immunities under the laws."[2] A claim brought under section 1985(3) must allege the following elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of this conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Broth. of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 828-29 (1983). Furthermore, the complaint must contain an allegation of "racial, or perhaps other class-based, invidioiusly discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971) (limiting § 1985(3).)

To allege a claim of conspiracy, a plaintiff must allege facts with sufficient particularity to show an agreement or a meeting of the minds to violate the plaintiff's constitutional

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2. "Section 1985 contains three substantive sections. Section 1985(1) concerns preventing an officer of the United States from performing his or her duties. Section 1985(2) concerns conspiracy to obstruct justice in the federal courts or state courts, or to intimidate a witness or juror therewith." Bretz v. Kelman, 773 F.2d 1026, 1027 n.3 (9th Cir. 1985).

rights. Woodrum v. Woodward County, Okl., 866 F.2d 1121, 1126 (9th Cir. 1989). "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." Ivey, 673 F.2d at 268; Aldabe v. Aldabe, 616 F.2d at 1092 (conclusory allegations of conspiracy insufficient to support a claim under § 1985).

Plaintiff does not allege any facts in support of his conclusory allegation that defendant's actions constitute "conspiracy to illegally charge me for being in an alleged gang." (Complaint para. IV; p. 4, II l - 4.) Plaintiff has also failed to allege an agreement or meeting of the minds on the part of the defendant with any other individual to violate plaintiff's constitutional rights. "A claim under this section must allege facts to support the allegation that defendants conspired together. A mere allegation of conspiracy without factual specificity is insufficient to support a claim." Karim-Panahi, 839 F.2d at 626. Thus, plaintiff's § 1985(3) claim fails.

The Court **GRANTS** defendant's motion to dismiss plaintiff's § 1985(3) claim. Plaintiff's § 1985(3) claim is **DISMISSED, without prejudice**. Plaintiff's failure to address the pleading deficiencies in his § 1985(3) claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

b. 42 U.S.C. § 1986

42 U.S.C. § 1986 provides a cause of action for neglect to prevent a conspiracy to violate constitutional rights. As such, a claim under § 1986 is derivative of a claim under § 1985. Without a violation of the latter, there can be no violation of the former. McCalden v. California Library Ass'n, 955 F.2d 1214, 1223 (1990), cert denied 504 U.S. 957 (1992) ("a claim can be stated under § 1986 only if the complaint contains a valid claim under § 1985.")

Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's § 1986 claim. Plaintiff's § 1986 claim is

DISMISSED, without prejudice. Plaintiff's failure to address the pleading deficiencies in his § 1986 claim will result in future dismissal of the claim with prejudice. Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

C. Supplemental Jurisdiction Over Plaintiff's State Law Claims

Generally, dismissal of federal claims before trial dictates that the pendent state law claims should also be dismissed. 28 U.S.C. § 1367(d); Schultz v. Sundberg, 759 F.2d 714, 718 (9th Cir. 1985). Because the Court has granted defendant's motion to dismiss all the federal claims originally joined with plaintiff's state law claims, the Court declines to exercise supplemental jurisdiction over plaintiff's state law claims. Accordingly, the Court **GRANTS** defendant's motion to dismiss plaintiff's state law claims for malicious prosecution, defamation of character, libel, and fraud. Plaintiff's state law claims are **DISMISSED, without prejudice.**

D. Conclusion

The Court **GRANTS** defendant's motion to dismiss the claims under Rule 12(b)(6):

a) The Eighth Amendment claims based upon conditions of confinement and failure to protect are **DISMISSED, without prejudice**. Plaintiff shall have forty-five (45) days from the file-stamped date of this Order to file an amended complaint with respect to these claims.

b) The due process claim based upon plaintiff's placement in Ad-Seg is **DISMISSED, without prejudice.** Plaintiff shall have forty-five (45) days from the file-stamped date of this Order to file an amended complaint with respect to this claim. The due process claim based upon plaintiff's loss of his work assignment is **DISMISSED, with prejudice.**

c) The equal protection claim is **DISMISSED, without prejudice.** Plaintiff shall have forty-five (45) days from the file-stamped date of this Order to file an amended complaint with respect to this claim.

d) The §§ 1985 and 1986 claims are **DISMISSED, without prejudice.** Plaintiff shall have forty-five (45) days from the file-stamped date of this Order to file an amended complaint with respect to these claims.

e) The state law claims are **DISMISSED, without prejudice.**

IT IS SO ORDERED.

DATED: July 25, 1997 /s/Irma E. Gonzalez
IRMA E. GONZALEZ, Judge
United States District Court